Brilliant Team Management Sdn Bhd v South East Pahang Oil Palm Sdn Bhd & Ors

HIGH COURT (MELAKA) — SUIT NO MT1–22–191 OF 2003
LOW HOP BING J
20 APRIL 2006

Agency — Agent — Estate agent — Whether finder's fee was actually an estate agent's fee

Agency — Agent — Estate agent — Whether plaintiff's conduct being not merely confined to a single transaction constituted an 'estate agency practice' — Whether there was estate agency relationship between plaintiff and the defendants — Valuers, Appraisers and Estate Agents Act 1981 ss 2, 22B and 22C

Companies and Corporations — Directors — Personal liability — Whether director was personally liable for contracts entered into on behalf of the company

Contract — Illegality — Contravention of law — Claim for finder's fee by unregistered estate agent — Whether contract for finder's fee illegal and void — Valuers, Appraisers and Estate Agents Act 1981 ss 2, 22B and 22C

The first and second defendants ('DD1 and 2') were the registered and beneficial owners of a piece of land ('the property'). At the material time, the third defendant ('D3') was a director of DD1 and 2. DD1 and 2 wanted to sell the property. Vide plaintiff's letter dated 14 July 2003 ('the plaintiff's letter'), the plaintiff described itself as a 'deal maker'. At a meeting with D3, the plaintiff's director Tan Tuan Seng ('the plaintiff's director') told D3 that the plaintiff had successfully concluded five previous sale and purchase transactions. The plaintiff's letter stated that the plaintiff's clients would like to offer to purchase the property from DD1 and 2 at RM89m and the plaintiff's 'finder's fee' shall be RM1m. The plaintiff's director embarked upon five months of continuous and serious discussions with D3 and successfully procured United Malacca as the purchaser of DD1 and 2's shares, with the eventual take-over of the property at a consideration of RM88m. For this transaction, the plaintiff through its director had given advice to D3 in relation to the implications arising from the sale of the shares of DD1 and 2 and the sale of the property. The plaintiff however was not a registered estate agent. The plaintiff then sued for its finder's fee and other fees. The defendants sought for an order to strike out the plaintiff's statement of claim under O 18 r 19 of the Rules of the High Court 1980. The learned registrar dismissed the application with costs. The defendants appealed. Learned counsel for the defendants submitted that: (1) the plaintiff's statement of claim disclosed no reasonable cause of action against D3 who merely

acted as a director and an agent of DD1 and 2, and that D3 was not personally liable for contracts entered into on behalf of the companies viz DD1 and 2; (2) the plaintiff's claim for finder's fee was actually an estate agent's fee; (3) the plaintiff's conduct being not merely confined to a single transaction constituted an 'estate agency practice' under ss 2, 22B and 22C of the Act; (4) there was a estate agency relationship between the plaintiff and the defendants; and (5) the Valuers, Appraisers and Estate Agents Act 1981 ('the Act') was applicable to the plaintiff.

Held, allowing the defendants' application:

(1) The two individuals Tan Tuan Seng and D3 were at the material time the respective directors of the plaintiff on the one hand, and DD1 and 2 on the other. It had never been doubted that they were at the material time acting in a representative capacity for the respective companies, for which they were the agents (see para 23). The discussions, negotiations or communications between these two individuals viz the plaintiff's director and D3 had indeed been undertaken or embarked upon for and on behalf of their respective companies and must for all practical purposes be imputed or attributed to the acts of their respective companies (see para 25). Furthermore, the plaintiff's statement of claim did not plead the existence of any agreement or document to render D3 personally liable for the breaches or acts of the principals viz DD1 and 2 (see para 26). Also, there was no privity of contract between the plaintiff and D3 (see para 31).

(2) A finder is in fact and in law an agent and a finder's fee is an agent's fee or commission payable in successfully procuring purchasers in property or real estate transactions (see para 43).

(3) The plaintiff's own affidavit averred that it had, prior to the transaction herein, held itself out to the public as carrying on estate agency practice and had indeed clinched not less than five astronomical deals involving land, building or interest therein, and the parties thereto were public listed companies and public corporate captains. The plaintiff had embarked on the introduction of three potential purchasers to DD1 and 2 for the purposes of taking over DD1 and 2's property. It was plain and obvious that there was a system or course of conduct on the part of the plaintiff. Further evidence of the estate agency practice was provided by the plaintiff's own admission in its director's affidavit that the plaintiff had introduced to United Malacca four mega real estate projects in Malaysia, Indonesia and China for the purpose of the acquisition of land, building or interest therein. Based on this, the court held that the plaintiff had carried on estate agency practice within the meaning of ss 2, 22B and 22C of the Act (see para 54).

(4) The plaintiff had offered and given DD1 and DD2 professional advice pertaining to the complexities of the disposal of the property and/or the interest therein. Therefore, an estate agency relationship had been established and entrenched between the plaintiff and DD1 and 2, on which the plaintiff's claim was firmly predicated (see para 60).

(5) As the plaintiff was claiming 'finder's fee', ie brokerage fee, and the deal was for the sale and purchase of DD1 and 2's equities and the crude palm oil mill which virtually, effectively and ultimately involved the take-over of DD1 and 2's property, the plaintiff's conduct came fairly and squarely within the provisions of the Act, generally and ss 2, 22B and 22C specifically. Since the plaintiff was not a registered estate agent, under s 22C(1)(d), the plaintiff was not entitled to the claim herein as the agreement was illegal and void under s 24 of the Contracts Act 1950 (see para 64).

[Bahasa Malaysia summary

Defendan-defendan pertama dan kedua ('DD1 dan 2') merupakan pemilik berdaftar dan benefisiari sekeping tanah ('hartanah tersebut'). Pada masa matan, defendan ketiga ('D3') merupakan pengarah DD1 dan 2. DD1 dan 2 ingin menjual hartanah tersebut. Melalui surat plaintif bertarikh 14 Julai 2003 ('surat plaintif'), plaintif menggambarkan dirinya sebagai 'deal maker'. Di mesyuarat dengan D3, pengarah plaintif Tan Tuan Seng ('pengarah plaintif') memberiktahu D3 bahawa plaintif telah berjaya membuat lima transaksi jualbeli sebelumnya. Surat plaitnif menyatakan bahawa pelanggan plaintif ingin membuat tawaran untuk membeli hartanah tersebut daripada DD1 dan 2 pada harga RM89j dan 'finder's fee' plaintif adalah RM1j. Pengarah plaintif telah memulakan untuk lima bulan berturut-turut perbincangan serius dengan D3 dan telah berjaya mendapatkan United Malacca sebagai pembeli saham-saham DD1 dan 2, dengan akhirnya suatu pengambilalihan hartanah tersebut pada harga RM88j. Untuk transaksi ini, plaintif melalui pengarahnya telah memberikan nasihat kepada D3 berhubung implikasi yang timbul daripada jualan saham-saham DD1 dan 2 dan jualan hartanah tersebut. Plaintif bagaimanapun bukan seorang ejen hartanah berdaftar. Plaintif kemudian telah menyaman untuk yuran pencari dan yuran lain-lainnya. Defendan-defendan telah memohon untuk satu perintah jualan bagi membatalkan penyataan tuntutan plaintif di bawah A 18 k 19 Kaedah-Kaedah Mahkamah Tinggi 1980. Pendaftar yang bijaksana telah menolak permohonan dengan kos. Defendan-defendan telah merayu, Peguam yang bijaksana bagi pihak defendan-defendan telah berhujah bahawa: (1) penyataan tuntutan plaintif tidak menunjukkan apa-apa kausa tindakan yang munasabah terhadap D3 yang hanya bertindak sebagai pengarah dan ejen DD1 dan 2, dan bahawa D3 tidak bertanggungjawab secara peribadi untuk kontrak-kontrak yang dimasuki bagi pihak syarikat-syarikat tersebut iaitu DD1 dan 2; (2) tuntutan plaintif untuk yuran pencari itu sebenarnya merupakan yuran ejen hartanah; (3) perbuatan plaintif yang bukan hanya terbatas kepada satu transaksi membentuk satu 'estate agency practice' di bawah ss 2, 22B dan 22C Akta tersebut; (4) terdapat perhubungan ejensi hartanah antara plaintif dan defendan-defendan; dan (5) Akta Penilai, Penaksir dan Ejen-Ejen Harta-Tanah 1981 ('Akta tersebut') adalah terpakai terhadap plainitf.

Diputuskan, membenarkan permohonan defendan-defendan:

(1) Kedua-dua individu Tan Tuan Seng dan D3 pada masa matan merupakan pengarah-pengarah plaintif di satu pihak, dan DD1 dan 2 di satu pihak masing-masingnya. Tidak diragui bahawa mereka pada masa matan bertindak dalam kapasiti seorang wakil untuk syarikat-syarikat tersebut, yang mana

mereka merupakan ejen-ejen (lihat perenggan 23). Perbincangan, perundingan atau perhubungan antara kedua-dua individu tersebut iaitu pengarah plaintif dan D3 sememangnya telah dimulakan untuk dan bagi pihak syarikat mereka masing-masingnya dan perlu bagi semua tujuan praktikal dianggap sebagai berpunca daripada tindakan syarikat-syarikat masing-masing (lihat perenggan 25). Bahkan, penyataan tuntutan plaintif tidak memplidkan kewujudan apa-apa perjanjian atau dokumen untuk menyebabkan D3 bertanggungjawab secara peribadi untuk pelanggaran atau tindakan prinsipal-prinsipal tersebut iaitu DD1 dan 2 (lihat perenggan 26).

(2) Pencari adalah dari segi fakta dan undang-undang seorang ejen dan yuran pencari adalah yuran ejen atau komisen yang perlu dibayar kerana berjaya mendapatkan pembeli untuk transaksi-transaksi hartanah (lihat perenggan 43).

(3) Afidavit plaintif sendiri menegaskan bahawa ia telah, sebelum transaksi tersebut, menggambarkan dirinya kepada awam sebagai menjalankan amalan ejensi hartanah dan sememangnya telah mengendalikan tidak kurang daripada lima transaksi yang melibatkan tanah, bangunan atau kepentingan di dalamnya, dan pihak-pihak tersebut merupakan syarikat-syarikat tersenarai awam dan syarikat-syarikat utama korporat awam. Plaintif telah memperkenalkan tiga pembeli berpotensi kepada DD1 dan 2 bagi tujuan mengambilalih hartanah DD1 dan 2. Ia adalah jelas dan nyata bahawa terdapat sistem atau susulan perbuatan di pihak plaintif. Bahkan keterangan tentang amalan ejensi hartanah dikemukakan oleh pengakuan plaintif sendiri dalam afidavit pengarahnya bahawa plaintif telah memperkenalkan kepada United Malacca empat projek besar hartanah di Malaysia, Indonesia dan Cina bagi tujuan pengambilalihan tanah, bangunan atau kepentingan dalamnya. Berdasarkan ini, mahkamah memutuskan bahawa plaintif telah menjalankan amalan ejensi hartanah dalam maksud ss 2, 22B dan 22C Akta tersebut (lihat perenggan 54).

(4) Plaintif telah menawarkan dan memberikan DD1 dan 2 nasihat profesional tentang kerumitan penjualan hartanah dan/atau kepentingan dalamnya. Oleh itu, hubungan ejensi hartanah telahpun wujud dan terjalin antara plaintif dan DD1 dan 2, di mana tuntutan plaintif diasaskan (lihat perenggan 60).

(5) Memandangakna plaintif menuntut 'finder's fee', iaitu yuran broker, dan urusan adalah untuk jualbeli ekuiti dan kilang minyak kelapa sawit DD1 dan 2 yang sebenarnya, secara berkesan dan secara langsung terlibat dalam pengambilalihan hartanah DD1 dan 2, perbuatan plaintif ternagkum dalam peruntukan Akta tersebut secara amnya dan ss 2, 22B dan 22C secara spesifik. Memandangkan plaintif bukan ejen hartanah berdaftar, di bawah s 22C(1)(d), plaintif tidak berhak untuk menuntutu kerana perjanjian tersebut adalah tidak sah dan menyalahi undang-undang di bawah s 24 Akta Kontrak 1950 (lihat perenggan 64).]

Notes

For cases on contravention of law, see 3(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 3620–3635.

For cases on estate agents, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 900–902.

For cases on personal liability of directors, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 268–273.

Cases referred to

Abdul Manaf Mohd bin Ghows & Ors v Nusantara Timur Sdn Bhd & Ors [1997] 3 MLJ 661 (refd)
Appadurai a/I Ponnusamy v Pentadbir Harta Pesaka Appalasamy a/l Nookiah, deceased & Anor [1998] 538 MLJU 1 (refd)
Double Acres Sdn Bhd v Tiarasetia Sdn Bhd [2000] MLJU 477 (refd)
Ferguson v Wilson [1866] LR 2 Ch App 77 (refd)
Freeman & Lockyer v Backhurst Park Properties (Mangal) Limited [1964] 2 QB 480 (refd)
Gilbert Engineering Co Inc v Zainuddin bin Ahmad & Ors [2001] MLJU 568 (refd)
Goldschmidt & Anor v Minai [2003] EWHC 1214 (refd)
Leng Hong Yuen v Escalation Enterprise Sdn Bhd & Ors [1989] 3 MLJ 190 (refd)
Lim Eng Heng v Lim Sam Keow & Ors [2003] 6 CLJ 1 (refd)
Naga Jaguh Development Sdn Bhd v Danaharta Urus Sdn Bhd [2005] 3 CLJ 818 (refd)
Ng Kian Chong & Ors v Saw Seng Kee [1994] 3 MLJ 691 (refd)
Northern Counties Securities Ltd v Jackson & Steeple Ltd [1974] 2 All ER 625 (refd)
Pertamina v Kartika Ratna Thahir & Ors [1983] 1 MLJ 136 (refd)
Raja Zainal Abidin bin Raja Haji Tachik & Ors v British-American Life & Generl Insurance Bhd [1993] 3 MLJ 16 (refd)
Teh Eng Peng @ Teh Joo v Teh Swee Lian [2006] 2 MLJ 305 (refd)
Teh Swee Lian lwn Teh Eng Peng & Satu Lagi [1998] 3 CLJ Supp 504 (refd)
Veetak Enterprise Sdn Bhd v The Kuala Lumpur Finance Bhd [1987] 1 MLJ 407 (refd)

Legislation referred to

Companies Act 1965
Contracts Act 1950 s 24
Rules of the High Court 1980 O 18 r 19(1)(a), (b), (d)
Valuers, Appraisers and Estate Agents Act 1981 ss 2, 22B, 22C

Kee Tong Kiak (Chee Siah Le Kee & Partners) for the plaintiff.
ST Lee (ST Lee & Partners) for the defendants.

Low Hop Bing J:

APPEAL

[1] Pursuant to O 18 r 19(1)(a), (b) or (d) of the Rules of the High Court 1980, vide application by way of summons in chambers in encl (4) as amended in encl (15) ('the application'), the defendants sought an order to strike out the plaintiffs statement of claim on the ground that:

(a) it discloses no reasonable cause of action;

(b) it is scandalous, frivolous or vexatious;

(c) ...; or

(d) it is otherwise an abuse of the process of the court.

[2] For brevity and convenience, a reference hereinafter to an order and a rule is a reference to that order and rule in the Rules of the High Court 1980 unless the context otherwise requires.

[3] The learned registrar had on 5 July 2004 dismissed the application with costs.

[4] Against that decision, the defendants have vide encl (24) appealed to me as judge in chambers.

FACTUAL BACKGROUND

[5] This is substantially uncontroverted.

[6] The first and second defendants ('DD1 and 2') are the registered and beneficial owners of 8,025 acres of land together with a 40-ton per hour crude palm oil mill in the mukim of Triang, Pahang (collectively, 'the property').

[7] At the material time, the third defendant ('D3') was a director of DD1 and 2.

[8] DD1 and 2 wanted to sell the property. Vide plaintiffs letter dated 14 July 2003 ('the plaintiff's letter'), the plaintiff described itself as a 'deal maker'. Through its director, Tan Tuan Seng ('the plaintiff's director'), the plaintiff was instructed by a potential purchaser to make an offer to acquire the property of DD1 and 2. Subsequently, the plaintiff introduced three other interested purchasers viz I & P Astral Enterprise Bhd, Ahmad Zaki Resources Bhd, both of which are public listed companies; and Felda Plantation Sdn Bhd of FELDA, ie Federal Land Development Authority, a statutory authority, to acquire the property but all these deals were unsuccessful as no sale and purchase agreement was executed between these parties, and DD1 and 2.

[9] Prior to the instant sale and purchase transaction on the basis of which the plaintiff is now making this claim against all the defendants, the plaintiff vide plaintiffs affidavit encl (8) para 5 affirmed by the plaintiffs director stated that on 19 February 2003, the plaintiffs director was introduced by one Tan Swee Tiak to D3 in Malacca. At the meeting, the plaintiffs director briefed him that he (the plaintiff's director)!was experienced in the mergers and acquisitions of plantations and housing projects. In the presence of the said Tan Swee Tiak, the plaintiffs director told D3 that the plaintiffs director had represented the plaintiff and successfully concluded the following five sale and purchase transactions:

(1) sale of Supreme Plantation to High and Low Land Bhd and KL Kepong Bhd;

(2) sale of 20,000 acres of Dunlop Estate Bhd to KL Kepong Bhd;

(3) sale of Malaysian Plantations to Lion Group (Tan Sri William Cheng);

(4) assisted one Dato' TK Lim in the disposal and sale of Dunlop Estate Plantation to IOI Group for R460m; and

(5) assisted General (Corporation in the disposal and sale of 5,000 acres of Kemayan Oil Palm Plantation at a consideration of RM35m.

[10] D3 was impressed by the performance in the above sale and purchase transactions handled by the plaintiff's director for the plaintiff.

[11] The parties to the above sale and purchase transactions are eminent public listed companies and the properties are real estates consisting of enormous acreages. Although no consideration was disclosed in three transactions viz (1) to (3), two other transactions viz (4) and (5) were clinched at astronomical considerations.

[12] The plaintiffs letter stated that the plaintiffs clients would like to offer to purchase the property from DD1 and 2 at RM89m and the plaintiffs 'finder's fee' shall be RM1m. Paragraphs 4 and 5 of the plaintiffs letter added:

> 4. Due diligence study
>
> This transction is subject to a 'Due Diligence Study
>
> 5. Liability clause
>
> The sale is free from encumbrances and subject to a SPA.

[13] The plaintiff subsequently disclosed that the interested purchaser was United Malacca Bhd ('United Malacca'), which is another renowned public listed company.

[14] Other relevant facts contained in the affidavit affirmed by the plaintiff's director are:

(1) As at the date of the plaintiff's letter, there was no discussion between the plaintiff's director and D3 in relation to the purchase of DD1 and 2's shares. However, after subsequent discussions between the plaintiffs director and D3, D3 agreed with the plaintiff's director to dispose of the shares of DD1 and 2 in which case only the Foreign Investment Committee ('FIG') approval was required. The plaintiff's director then introduced United Malacca to purchase the shares of DD1 and 2 (para 4).

(2) On 13 March 2002, the plaintiff's director sought D3's permission to allow plaintiff's clients to visit the site so that they could embark on a valuation of the property. The plaintiff's director also asked D3 to give him a copy of the valuation report, soil map and five years financial reports on the property (para 9).

(3) On 24 April 2003, the said Tan Swee Tiak and the plaintiff's director had a meeting with the directors of DD1 and 2 and asked the directors whether DD1 and 2 had decided to sell the property or the companies, advising them that if they decided to sell the companies, they should give the plaintiff's director five years financial reports of DD1 and 2 (para 11).

(4) On 7 May 2003, the plaintiffs director asked D3 to hand over to him the valuation report and the five years financial reports of DD1 and 2 (para 13).

(5) On 19 May 2003, the plaintiff s director informed D3 of the offer price of RM88m from the FELDA Group on the basis of sound and clean financial reports and also to collect frbm D3 the five years financial reports of DD1 and 2 (para 15).

(6) On 30 June 2003, the plaintiffs director collected from D3 the five years financial reports of DD1 and 2. Meanwhile, the plaintiffs director also visited United Malacca with the said Tan Swee Tiak to explore the possibility of doing a real estate deal with United Malacca and did introduce to United Malacca the following real estate projects:

(a) 5,500 acres of Kuala Kurai Oil Palm Plantation in Kelantan;

(b) 50,000 acres of Oil Palm Plantation in Sumatra, Indonesia;

(c) 10,000 acres of! agricultural land in Pahang; and

(d) Joint venture scheme in producing rubber gloves on Hainan Island China.

(7) United Malacca was not interested in the abovementioned real estate projects, but were looking for well managed oil palm plantation with good yield. The plaintiffs director recommended DD1 and 2's property, for which the plaintiffs director was asked to obtain a set of five years financial report (para 16).

(8) On 14 July 2003, the plaintiffs director went to see D3 to arrange for United Malacca's management to visit the property and asked D3 to consider a potential buyer willing to pay about RM89m for the purchase of the property immediately, for which the plaintiff wanted a finder's fee of RM1m, adding that it is subject to site visit of the property pn 17 July 2003 and due diligence study (para 19).

(9) The plaintiffs director embarked upon five months of continuous and serious discussions with D3 and successfully procured United Malacca as the purchaser of DD1 and 2's shares, with the eventual take-over of the property at a consideration of RM88m (para 22).

(10) For this transaction, the plaintiff through its director has given advice to D3 in relation to the implications arising from the sale of the shares of DD1 and 2 and the sale of the property. On the sale of the shares of DD1 and 2, the plaintiff advised that there would be no requirement to obtain the approval of HRH the Sultan of Pahang; that there would be no need to retrench the staff; that DD1 and 2 would have the prospect of becoming a public listed company; and there would be avoidance of tax by employing an experienced tax expert.

(11) On the sale of the property, the advice given by the plaintiff was that the approval of HRH the Sultan of Pahang was required; that compensation would be payable to the workers; that DD1 and 2 would not become a public listed company; that real property gains tax would be payable,; and that existing workers would be facing retrenchment (para 23).

[15] Other professional services rendered by the plaintiff through its director included:

(1) the strategic sale of the property, at an extra RM8m as the price should have been RM80m;

(2) providing market information services to D3;

(3) using the expertise in agriculture and networks to convince the interested party why the property was worth around RM88 to RM90m;

(4) recommending and advising on the sale and purchase of the shares of DD1 and 2 subject to Due Diligence Study'; and

(5) implementing corporate mergers and acquisitions (para 24).

[16] The plaintiff's memorandum and articles of association allow the plaintiff 'To carry on business as Advisers, Corporate Consultants, Representatives, Project Advisers and Managers to governments, business, commerce and industry, individuals and organisations and to identify, recommend, advise upon, direct or manage the business methods and systems, reconstruction, development expansion, administration, management, supervision, operations, investments and undertakings thereof.'

[17] The plaintiff is not a registered estate agent.

QUESTIONS FOR DETERMINATION

[18] From the pleadings, affidavits, documentary exhibits and submissions, I am of the view that the questions for determination by me in the instant appeal are:

(1) Does the plaintiff have a reasonable cause of action against D3 as a director of DD1 and 2? ('Question 1')

(2) What does the expression 'finder's fee' mean? ('Question 2')

(3) Was the plaintiff carrying on an estate agency practice? ('Question 3')

(4) Was there an estate agency relationship between the plaintiff and DD1 and 2? ('Question 4') and

(5) On the factual background as unfolded above, does the Valuers, Appraisers and Estate Agents Act 1981 ('the Act') apply to the plaintiff? ('Question 5')

DIRECTOR SUED AS D3

[19] Mr Kee Tong Kiak learned counsel for the defendants relied on O 18 r 19(1)(a) and submitted that the plaintiff's statement of claim discloses no reasonable cause of action against D3 who merely acted as a director and an agent of DD1 and 2, and that D3 was not personally liable for contracts entered into on behalf of the companies viz DD1 and 2, referring to paras 4, 5 8 and 9 of the plaintiff's statement of claim. Support was sought in:

(1) *Abdul Manaf Mohd bin Ghows & Ors v Nusantara Timur Sdn Bhd & Ors* [1997] 3 MLJ 661 (CA);

(2) *Gilbert Engineering Co Inc v Zainuddin bin Ahmad & Ors* [2001] MLJU 568 (HC);

(3) *Double Acres Sdn Bhd v Tiarasetia Sdn Bhd* [2000] MLJU 477 (HC);

(4) *Leng Hong Yuen v Escalation Enterprise Sdn Bhd & Ors* [1989] 3 MLJ 190 (HC).

[20] For the plaintiff, learned counsel Mr ST Lee relied on paras 5 and 8 to 14 of the plaintiff's statement of claim in support of his contention that D3 is personally liable.

[21] I am mindful of O 18 r 19(2) which states that in considering O 18 r 19(1)(a), no evidence shall be admissible. That being the case, I shall refer exclusively to the plaintiff's statement of claim. For this purpose, I shall enumerate the relevant averments in the statement of claim as follows:

(1) D3 is a director of DD1 and 2 (para 4);

(2) On 14 July 2003, plaintiff through its director Tan Tuan Seng personallyvide plaintiff's letter made an offer to D3, the former director in charge of DD1 and 2's finance, to take over DD1 and 2 on the terms and conditions stated therein, including a finder's fee of RM1m (paras 5, 6, 7 and 8).

(3) D3 promised Tan Tuan Seng that a finder's fee of RM1m would be paid to the plaintiff if the take-over of DD1 and 2 was successful (para 9);

(4) In line with D3's promise, the defendant (which defendant was not specified) gave the plaintiff all the statutory financial reports for the purpose of showing them to the intending purchaser for reference and consideration (para 10);

(5) Subsequently, plaintiff informed D3 that the intending purchaser was United Malacca and gave D3 the name of the agent with whom the defendants could discuss further (para 11);

(6) The initial purchase price was RM89m, but United Malacca's subsequent counter-offer of RM88m was accepted by DD1 and 2's boards (para 12);

(7) Pursuant to plaintiff's working papers, discussions and visits to DD1 and 2's plantation and site including the crude palm oil mill, United Malacca made an announcement in relation to the proposed take-over of all the issued and paid-up share capital of DD1 and 2 as at 25 September 2003 (para 13);

(8) On 10 November 2003, United Malacca's board of directors announced that with effect from that date, it has entered into:

(i) a conditional sale and purchase agreement with D1's holding company Nam Bee Sdn Bhd and 14 individual vendors for the proposed take-over of all the issued and paid- up share capital of D2 consisting of 4,000,000 ordinary shares at a cash consideration of RM49.6m; and

(ii) conditional sale and purchase agreement with D2's holding company Nam Bee Sdn Bhd and nine individual vendors for the proposed take-over of all the issued and paid up share capital of D1 consisting of 2,286,000 ordinary shares at a cash consideration of RM38.4m.

[22] The total consideration was therefore RM88m.

[23] A proper perusal of the above paras of the plaintiff's statement of claim makes it plain and obvious to me that the two individuals Tan Tuan Seng and D3 were at the material time the respective directors of the plaintiff on the one hand, and DD1 and 2 on the other. It has never been doubted that they were at the material time acting in a representative capacity for the respective companies, for which they were the agents: see Loh Siew Cheang, *Corporate Powers Controls, Remedies and Decision-Making* MLJ 1996 p 33; Loh Siew Cheang & William MF Wong, *Company Law Powers and Accountability*, LexisNexis Butterworths p 99; *Ferguson v Wilson* [1866] LR 2 Ch App 77; and *Freeman & Lockyer v Backhurst Park Properties (Mangal) Limited* [1964] 2 QB 480.

[24] Both the plaintiff and DD1 and 2 being abstractions or artificial persons have to act through some functionaries or human agency such as the plaintiff's director and D3 herein: see Loh Siew Cheang etc in *Company Law Powers and Accountability* p 97, where the learned author referred to the *Northern Counties Securities Ltd v Jackson & Steeple Ltd* [1974] 2 All ER 625 at p 634 where Walton J said:

> ... the company as such was only a juristic figment of the imagination, lacking both a body to be kicked and a soul to be damned. From this it followed that there must be some one or more human persons who did, as a matter of fact, act on behalf of the company, and whose acts therefore must, for all practical purposes, be the acts of the company itself.

[25] The discussions, negotiations or communications between these two individuals viz the plaintiff's director and D3 have indeed been undertaken or embarked upon for and on behalf of their respective companies and must for all practical purposes be imputed or attributed to the acts of their respective companies.

[26] It is significant to note that the plaintiff by suing singly as a registered company is indeed subscribing to the view that the plaintiff's director has no right to sue as all the acts of the plaintiff's director were the acts of the plaintiff as the principal. Since the plaintiff's director has no right to sue in his capacity as a director or agent, the reverse is true for D3 who as director or agent would not incur any liability to be sued, as D3's acts must indeed be the acts of DD1 and 2 as the principals. The plaintiff's statement of claim did not plead the existence of any agreement or document to render D3 personally liable for the breaches or acts of the principals viz DD1 and 2.

[27] Support for my view may be found in *Abdul Manaf Mohd*, where the Court of Appeal through the judgment of Siti Norma Yaacob JCA (now CJ (Malaya)) held, inter alia, that the directors who executed the agreement for a registered company could not be made personally liable for any liability for the company which was the actual contracting party. The reason for such a principle is the separate legal entity of an incorporated company having the capacity to sue and be sued in its own name and being an artificial person can only act through eg, directors who are not thereby personally liable for the breaches or acts of the company unless there are express provisions in the agreement or other document to the contrary making the directors personally liable for the breaches or acts of the company.

[28] Hence, in *Gilbert Engineering*, where the plaintiff's statement of claim showed that the company was the contracting party but not its directors, Vincent Ng J had no hesitation in striking out the statement of claim, under O 18 r 19(1)(a), on the ground that it disclosed no cause of action against the directors.

[29] Similarly, a conterclaim against a director-defendant, who at the material time was acting for and on behalf of a registered company, was struck out under O 18 r 19(1) by Abdul Malik Ishak J in *Double Acres*, on the ground that the defendant was not acting in a personal capacity and also in the absence of any privity of contract.

[30] In *Leng Hong Yuen*, the sixth defendant was the secretary of the first defendant which was a registered company, and was the authorised co-signatory of the first defendant's bank account. The first defendant obtained a loan of RM9.5m from a bank which agreed with the first defendant to release the first disbursement of RM5.5m. The first defendant then authorised the secretary, the sixth defendant, to make certain payments out of the RM5.5m to two persons, to whom the first defendant was indebted, one being the plaintiff. An arrangement was made between the plaintiff and the first defendant and pursuant thereto, the sixth defendant executed a written undertaking to make two payments of RM170,000 to the plaintiff. Subsequently the first to fifth defendants refused to honour the two payments to the plaintiff. The plaintiff turned to the sixth defendant on the written undertaking. The sixth defendant applied for and obtained an order from the registrar to strike out the plaintiff's writ and statement of claim under O 18 r 19(1)(a), which on appeal was affirmed by Siti Norma Yaakob J (now CJ (Malaya)) who held that the sixth defendant acted only on the instruction of the first defendant as the master and the secretary as the servant.

[31] By analogy, I would extend the position of the secretary to that of the director D3 in the instant appeal and add that there was no privity of contract between the plaintiff and D3.

[32] As a general rule, the doctrine of privity of contract enables only the original party to a contract to sue or be sued upon it, so that a third party does not enjoy the right to sue and incurs no liability to be sued: see *Double Acres*, per Abdul Malik Ishak J; *Kepong Prospecting Ltd*; *Tweddle v Atkinson*; and *Dunlop Pneumatic Tyre Co Ltd*.

[33] While I am mindful of the numerous exceptions to the doctrine of privity of contract, it must be immediately emphasised that none of those exceptions is applicable to the facts before me.

[34] My answer to Question 1 is in the negative.

FINDER'S FEE

[35] It was submitted for the defendants that the plaintiff's claim for finder's fee is actually an estate agent's fee, citing *Goldschmidt & Anor v Minai* [2003] EWHC 1214 (QB).

[36] The plaintiff contended that the finder's fee is more like a brokerage fee for introducing and securing a purchaser, ie United Malacca to buy DD1 and 2's equities with the crude palm oil mill erected on the property, relying on:

(a) An article by JF (JIM) Straw 'Earn Your Fortune In Finder's Fee'; and

(b) *New Website's Dictionary*.

[37] In my judgment, it needs to be observed that the plaintiff's grounds herein are premised on the provisions of O 18 r 19(1)(b) or (d). I shall therefore analyse the pleadings conjunctively with the respective affidavits and documentary exhibits filed by the parties herein, in addition to the authorities cited in their respective submissions.

[38] First, in the five-page article 'Earn Your Fortune in Finder's Fee' by one JF (Jim) Straw, cited for the plaintiff, I am unable to find the source of reference or credential of the author in order to assist me in determining its authoritative or persuasive quality. With the utmost respect, I decline to attribute any persuasiveness to its content or any part thereof.

[39] The submission for the plaintiff that the finder's fee is more like a brokerage fee makes it necessary for me to ascertain the meaning of the word 'broker'. According to *The New Oxford Thesaurus of English*, OUP 2000, a 'broker' is, inter alia, an agent, negotiator, middleman, intermediary, representative or go-between, while in the *CCH Macquarie Concise Dictionary of Modern Law*, a 'broker' is an agent whose business it is to arrange contracts for the 'buying and selling of various forms of property and services'.

[40] In considering the meaning and legal effect of the expression 'finder's fee', as stated in the plaintiff's letter, it is useful to refer to the *New Website's Dictionary*, where 'finder' is 'one who finds'; while 'finder's fee', in business, is 'a commission or fee paid to one who introduces a customer, arranges financing, or independently performs similar negotiations or services on behalf of a commercial firm'.

[41] I would add in my judgment that a finder must necessarily act on the basis of some instructions or mandate from the principal for whom the finder is an agent.

[42] In *Goldschmidt & Anor*, the claimant's (plaintiff"s) claim was based on the defendant's liability to pay a 'finder's fee' calculated at 1% of the purchaser's price of the property to which the defendant had been introduced by the plaintiff. The judgment of N Wilkinson QC delivered in the Queen's Bench Division treated the finder's fee as a commission (see, eg paras 1, 3, 15, 16, 26 and 28 therein).

[43] From the above dictionaries, for laymen and for lawyers, and also the judgment in *Goldschmidt & Anor*, it is abundantly clear to me that a finder is in fact

and in law an agent and a finder's fee is an agent's fee or commission payable in successfully procuring purchasers in property or real estate transactions.

ESTATE AGENCY PRACTICE

[44] The defendants subscribed to the view that on the facts, the plaintiff's conduct being not merely confined to a single transaction constituted an 'estate agency practice', under ss 2, 22B and 22C of the Act ('ss 2, 22B and 22C'). Support was sought in:

(i) *Lim Eng Heng v Lim Sam Keow & Ors* [2003] 6 CLJ 1 (HC); and

(ii) *Appadurai a/l Ponnusamy v Pentadbir Harta Pesaka Appalasamy a/l Nookiah, deceased & Anor* [1998] 538 MLJU 1.

[45] Plaintiff took the position that the plaintiff's claim is based on an one-off transaction for the acquisition of DD1 and 2's shares and stocks which do not fall within the ambit of an 'estate agency practice' adding that the plaintiff's claim is not a plain and obvious case to be struck out under O 18 r 19(b) or (d), relying on:

(a) *Veetak Enterprise Sdn Bhd v The Kuala Lumpur Finance Bhd* [1987] 1 MLJ 407 (HC);

(b) *Pertamina v Kartika Ratna Thahir & Ors* [1983] 1 MLJ 136 (Singapore HC);

(c) *Raja Zainal Abidin bin Raja Haji Tachik & Ors v British-American Life & Generl Insurance Bhd* [1993] 3 MLJ 16 (SC); and

(d) *Ng Kian Chong & Ors v Saw Seng Kee* [1994] 3 MLJ 691 (HC).

[46] In my judgment, the answer to this question is to be found in the true construction of the expression 'estate agency practice' in the light of ss 2, 22B and 22C.

[47] The interpretation section, ie s 2 does not provide for the definition of an estate agent but instead defines where relevant, 'estate agency practice', as meaning 'acting or holding oneself out to the public as ready to act, for a commission, fee, reward or other consideration, as an agent in respect of the sale or other disposal of land and buildings and of any interest therein or the purchase or acquisition of land and buildings and or any interest...'

[48] Sections 22B(1) and 22C(1), where relevant, merit reproduction as follows:

> Estate agency practice
>
> registered estate agent who has been issued with an authority to practise by the Board shall be entitled to practise his profession and shall be authorised to undertake estate agency practice,
>
> Restrictions on estate agency practice
>
> 22C (1) No person shall unless he is a registered estate agent and has been issued with an authority to practise under section 16 —

(a) practise or carry on business under any name, style or title containing the words 'Estate Agent', 'House Agent', 'Property Agent', 'Land Agent', 'House Broker' or the equivalent thereto, in any language or bearing any other word whatsoever in any language which may reasonably be construed to imply that he is a registered estate agent;

(aa) carry on business... as an estate agent;

(b) ...;

(ba) offer for sale or invite offers to purchase any land building and any interest therein irrespective of whether such land, building and interest is located within Malaysia or outside Malaysia: Provided that where foreign properties are to be marketed in Malaysia, such offer or invitation shall be made by or through an estate agent practising and residing in Malaysia on behalf of a principal practising or residing outside Malaysia;

(c) undertake any of the work specified in section 22B; or

(d) be entitled to recover in any court any fees, charges or remuneration for any professional advice or services rendered as an estate agent.

[49] The question of whether a person can be considered to have carried out 'estate agency practice' as defined in s 2 may be answered by looking at the surrounding circumstances relating to the sale transaction itself and any similar transaction(s) that the person may have been involved: *Teh Eng Peng @ Teh Joo v Teh Swee Lian* [2006] 2 MLJ 305 (CA). The land owners there were the respondent's father and uncles. The respondent had not held himself out as carrying on estate agency practice or carried out similar transaction on previous occasion, except the isolated transaction in question. The Court of Appeal speaking through Arifin Zakaria JCA (now FCJ) held that what had taken place was not caught by ss 22B and 22C as there was not in existence a system or course of conduct which went to show that the respondent was practising or carrying on business as estate agent. The Court of Appeal expressed full agreement with the reasoning and conclusion of Azhar Maah J in *Teh Swee Lian lwn Teh Eng Peng & Satu Lagi* [1998] 3 CLJ Supp 504 (HC) to the following effect:

(1) 'estate agent' is 'a person whose business is the sale or lease of buildings and land on behalf of others', while 'business' means 'one's regular occupation, profession or trade';

(2) 'practice' in the expression 'estate agency practice' means habitual action, established business;

(3) as the landowners were part of the plaintiff's family viz father and uncles and the deal was 'incidental' or 'in isolation', that transaction per se did not constitute 'practice'; and

(4) the plaintiff succeeded in claiming his fees being outside the purview of the Act.

[50] A similar conclusion was arrived at in *Matad Sdn Bhd*, where the defendant, being interested in buying some land, promised to pay the plaintiff 1% commission for introducing land. The plaintiff introduced the defendant to a vendor with land for sale at a substantial price. The defendant bought the land but refused to pay the plaintiff his commission which the plaintiff sought to recover. The plaintiff's claim of the limited occasion that he had engaged himself in the activity of introducing land for purchase or sale has been accepted by the trial judge and affirmed by the Court of Appeal. The defendant had contended, inter alia, that the commission contract was illegal and void in that it had contravened the Act. The High Court rejected that

contention and found for the plaintiff. On appeal, the illegality point was re-ventilated by the defendant. Gopal Sri Ram JCA who delivered judgment for the Court of Appeal noted that:

(1) the Act did not define 'estate agent' but instead defines 'estate agency practice' and focused the discovery of Parliamentary intention by referring to s 22C which provides for restrictions on estate agency practice;

(2) the word 'acting' in s 2 must be read contextually ie, in the context of s 22C which contemplates someone who 'practises' or who may 'carry on business' as 'an estate agent', as in s 22C(1)(a) and (aa);

(3) special notice should also be taken of the use of the word 'practise' in the opening words of s 22C(1), which requires some system, a course of conduct, but not an isolated act;

(4) s 22C must be given a contextual interpretation, based on the language employed by the section itself;

(5) in *Teh Swee Lian*, Azhar Maah J had correctly held on the facts before him, that an isolated act did not constitute holding out by the plaintiff and that evidence of system was necessary to prove estate agency practice; and

(6) in *Lim Eng Heng*, Su Geok Yiam JC (now J) following *Appadurai* appears to have held on the facts before her that an isolated transaction fell within the terms of the Act so that the plaintiff's claim in that case was tainted with illegality, and added that if by her judgment she meant to say that as a matter of law, an isolated transaction would fall within s 22C, then the Court of Appeal respectfully said that that case was wrongly decided, although the Court of Appeal did agree that what appeared to be an isolated act may amount to estate agency practice if evidence of a system of such acts is established to the satisfaction of the court.

[51] From the aforesaid authorities, it is trite law that for the purposes of ss 2, 22B and 22C, the essential ingredients of estate agency practice are:

(1) business, eg by way of regular occupation, profession or trade; and

(2) practice by way of a system or course of conduct, as opposed to an incidental, isolated, single, limited or one-off transaction.

[52] It is to be noted that in all the aforesaid authorities, the claims by the respective plaintiff were based on an isolated act.

[53] However, the plaintiff herein is a company registered under the Companies Act 1965 for the purposes of doing business as advisers, corporate consultants etc. as elaborated in its memorandum and articles of association detailed in the factual background earlier in this judgment. It has a registered office as a business base or establishment. In my view there can be no doubt that the ingredient of 'business' exists here.

[54] The plaintiff's own affidavit avers that it has, prior to the transaction herein, held itself out to the public as carrying on estate agency practice and has indeed clinched not less than five astronomical deals involving land, building or interest therein, and the parties thereto were public listed companies and public corporate captains. The plaintiff has embarked on the introduction of three potential purchasers to DD1 and 2 for the purposes of taking over DD1 and 2's property. It is plain and obvious that there is a system or course of conduct on the part of the plaintiff. Further evidence of the estate agency practice was provided by the plaintiff's own admission in its director's affidavit that the plaintiff has introduced to United Malacca four mega real estate projects in Malaysia, Indonesia and China for the purpose of the acquisition of land, building or interest therein. The facts which I have alluded to above have taken an exceptional complexity, pattern and dimension which can find no analogy or parallel in the facts unfolded in an isolated transaction in all the aforesaid authorities. On the facts and circumstances before me, I am satisfied and hold that the plaintiff has carried on estate agency practice, within the meaning of ss 2, 22B and 22C.

[55] Hence, I answer Question 3 in the affirmative.

ESTATE AGENCY RELATIONSHIP

[56] It was submitted for the plaintiff that there was no estate agency relationship between the plaintiff and the defendants, while the defendants contended that such a relationship existed.

[57] It is necessary for me to refer to the Court of Appeal judgments in *Matad Sdn Bhd* and *Teh Eng Peng* which consistently held that the existence of an estate agency relationship is essential in order to attract the application of the Act; and that whether such a relationship exists in a given case is a question of fact depending upon the facts and circumstances of each case.

[58] Therefore the issue which has to be addressed by me is whether, having regard to the facts and circumstances herein, the plaintiff has given or offered to the defendants any professional advice or other services in the plaintiff's estate agency practice.

[59] In a nutshell, the starting point is the plaintiff's role as a deal-maker through its director who had contacted D3 as a director of DD1 and 2 for the purpose of disposing of the property. The plaintiff has made every effort to convince the defendants of the plaintiff's experience in clinching various deals involving properties and interest in properties. The plaintiff also set the term of the said finder's fee in the plaintiff's letter to D3. The plaintiff's letter added that the transaction was subject to a due diligence study, free from encumbrances and subject to a sale and purchase agreement. A series of discussions ensued between the plaintiff and the defendants, in which the defendants agreed with the plaintiff's director to dispose of the shares for which the plaintiff advised that the FIC approval was required. Other professional advice given by the plaintiff includes evaluation of the property, five years financial report on the property, take-over of the property by way of the acquisition of shares,

A the alleged dispensation with the approval by HRH the Sultan of Pahang, the avoidance of payment of compensation to existing workers, listing DD1 and 2 as public listed companies, saving or avoidance of real property gains tax, the strategic sale of the property at an extra RM8m, as the price should have been RM80m, market information sevices and expertise in agriculture and networking.

B

[60] Given the above facts and circumstances, it is my specific finding of fact that the plaintiff has offered and given DD1 and 2 professional advice pertaining to the complexities of the disposal of the property and/or the interest therein and that an estate agency relationship has been established and entrenched between the plaintiff C and DD1 and 2, on which the plaintiff's claim is firmly predicated.

[61] It is necessary for me to emphasise that for the avoidance of doubt, the correctness and accuracy of the professional advice given by the plaintiff to the defendants is not the issue before me and so I will refrain from expressing my views D thereon.

[62] My answer to question 4 is also in the affirmative.

APPLICABILITY OF THE ACT

E

[63] The plaintiff submitted that the Act is inapplicable while a contrary view was taken for all the defendants.

F **[64]** As the plaintiff is now claiming 'finder's fee', ie brokerage fee, and the deal was for the sale and purchase of DD1 and 2's equities and the crude palm oil mill which virtually, effectively and ultimately involve the take-over of DD1 and 2's property, I am of the view that the plaintiff's conduct comes fairly and squarely within the provisions of the Act generally and ss 2, 22B and 22C specifically. Since the plaintiff is not a registered estate agent, under s 22C(1)(d), the plaintiff is not entitled to the G claim herein as the agreement is illegal and void under s 24 of the Contracts Act 1950.

[65] This is therefore a plain and obvious case in which the plaintiff's claim is frivolous and vexatious in the sense of being conspicuously unsustainable, thereby H attracting the application of O 18 r 19(1)(b): *Naga Jaguh Development Sdn Bhd v Danaharta Urus Sdn Bhd* [2005] 3 CLJ 818; *Veetak Enterprise* at p 41F left column per Gunn Chit Tuan J (later CJ (Malaya)); *Pertamina* at p 141A left column per Sinnathuray J (Singapore); and *Raja Zainal*, per Peh Swee Chin SCJ (as he then was).

I CONCLUSION

[66] On the foregoing grounds, I am of the view that the defendants' application should have been allowed. I therefore hold that the learned registrar has erred in dismissing the defendants' application. I allow this appeal in encl (24) with costs, set

aside the learned registrar's order and make an order in terms of the application viz to strike out the plaintiff's claim, against D3 under O 18 r 19(1)(a), and, against all the defendants, under O 18 r 19(1)(b).

Defendants' application allowed.

Reported by Loo Lai Mee